

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
Debtor. . Detroit, Michigan
May 12, 2014
10:00 a.m.
• • • • •

HEARING RE. (#4532) LETTER FROM EXPERT WITNESS MARTHA E.M. KOPACZ; (#4511) MOTION TO COMPEL WAYNE, MACOMB AND OAKLAND COUNTY, MICHIGAN TO PRODUCE A PRIVILEGE LOG FILED BY OFFICIAL COMMITTEE OF RETIREES, ANY REMAINING OBJECTIONS TO WRITTEN DISCOVERY (#4202) (#4508); (#4437) RESPONSE TO DISCOVERY -- OBJECTION TO SUBPOENA FROM THE OFFICIAL RETIREE'S COMMITTEE FOR DEBTOR -- FILED BY INTERESTED PARTY WAYNE COUNTY CORPORATION; (#4537) EXPEDITED MOTION TO WITHDRAW AS ATTORNEY BY BARBARA A. PATEK FOR THE LAW FIRM OF ERMAN, TEICHER, ZUCKER & FREEDMAN, P.C.; (#4409) MOTION TO COMPEL THE DEBTOR TO PROVIDE MORE SPECIFIC DESCRIPTIONS OF THE SUBJECTS THAT EACH FACT WITNESS WILL ADDRESS FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#4565) MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#4557) MOTION TO COMPEL RESPONSES TO SYNCORA'S FIRST SET OF INTERROGATORIES TO THE CITY OF DETROIT (DOC NO. 4036) MOTION TO COMPEL RESPONSES TO INTERROGATORIES FILED BY INTERESTED PARTIES SYNCORA CAPITAL ASSURANCE, INC., SYNCORA GUARANTEE, INC.; (#4580) MOTION TO COMPEL FULL CLAWBACK OF DEBTOR'S DOCUMENT PRODUCTION AND RELATED RELIEF FILED BY CREDITOR ASSURED GUARANTY MUNICIPAL CORP.
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Good morning. We have a number of
4 matters on our docket for today. Let me tell you what the
5 order of them will be. We will start with the motion to
6 withdraw and then move to Ms. Kopacz's letter and then the
7 motion to compel the clawback and then the motion to compel
8 the counties to provide a privilege log and then the three
9 Syncora motions to provide more specific description of
10 witnesses' subjects, to compel the production of documents
11 and to compel responses to interrogatories and then
12 everything else. Okay. The motion to withdraw.

13 MS. PATEK: Good morning, your Honor. Barbara
14 Patek, Erman, Teicher, Zucker & Freedman. As the Court is
15 aware, throughout these proceedings Erman Teicher has
16 represented the four Detroit public safety unions, the
17 Detroit Police Command Officers Association, the Detroit
18 Police Lieutenants and Sergeants Association, the Detroit
19 Police Officers Association, and the Detroit Fire Fighters
20 Association. As a result of the exhaustive efforts that took
21 place in mediation, two of the four public safety unions have
22 reached a resolution of their main economic issues with the
23 city and will be supporting the plan of adjustment. The
24 Detroit Police Officers Association and the Detroit Fire
25 Fighters Association have not been able to reach agreement

1 with the city. As a result, we find ourselves in a situation
2 where we have clients who going forward are going to be in
3 directly adverse positions, and we have obtained the consent
4 of all clients, their representatives in the courtroom of all
5 the clients, and we are seeking an order allowing us to
6 continue representing the two objecting public safety unions.

7 THE COURT: All right. Thank you. Is there anyone
8 who'd like to say anything about this matter? The Court
9 concludes that the record does establish cause for the relief
10 sought. The motion is granted. You may submit an order, and
11 the Court will waive further presentment.

12 MS. PATEK: Thank you, your Honor.

13 THE COURT: All right. Stand by one moment, please.
14 All right. Let's turn our attention then to Ms. Kopacz's
15 letter.

16 MS. KOPACZ: Good morning, Judge. I sent you a
17 letter last week asking for clarification of the
18 confidentiality provision that is part of the order
19 appointing me as well as a request to hire counsel for
20 limited purposes. I tried to provide you some examples in
21 the letter of questions that are being raised by parties
22 which, again, I want to be real clear. I'm not complaining.
23 I understand that people are concerned that if they give me
24 information, other people may have access to it. Parties are
25 concerned if they provide me information that has never been

1 provided to another party, that somehow they're waiving
2 privilege. There's also been a request to participate in
3 interviews that I conduct on some basis, so really just here
4 asking for some guidance and some help.

5 THE COURT: Okay. Thank you for your letter. I
6 want to try to get this resolved as promptly as possible, and
7 I seek the input of counsel here, too. I think we want to
8 balance the interests of all concerned in this matter with my
9 interest and I assume the city's interest in having
10 Ms. Kopacz do her work as efficiently as possible. Frankly,
11 in my order, when I referred to confidentiality, I obviously
12 was not clear enough, but what I had in mind was little more
13 than not talking with anyone not directly associated with the
14 case about the case or about your work, so, for example,
15 media or other strangers to the case. I had little more in
16 mind than just that.

17 In terms of the confidentiality of the information
18 you gather vis-a-vis other parties in the case, what I
19 foresaw was that all such information that you had gathered
20 during your investigation would either be a part of your
21 report or a part of the attachments to your report where you
22 reflected in your log what communications you had had with
23 various people who had provided you with information and some
24 description of what that information was, so I don't know.
25 Does that help to limit the conversation to any extent?

1 MS. KOPACZ: No. I'm sorry. No. It really goes to
2 the information that I am trying to gather. Okay. So, for
3 example, there are creditor constituencies whose financial
4 advisors I have met with, talked with, who have information
5 from their work, their analyses, that I believe would be very
6 helpful to my task.

7 THE COURT: Um-hmm.

8 MS. KOPACZ: And while those parties have not said
9 they're unwilling to provide me with their financial
10 advisors' work product, they are concerned that if they
11 provide it to me that it then becomes available to others.
12 There's also a concern some parties have raised if they give
13 me information that they have never given anyone else that
14 they would waive privilege to that. And, again, I don't
15 know.

16 THE COURT: What kind of privilege is that?

17 MS. KOPACZ: I have no idea.

18 THE COURT: You don't know.

19 MS. KOPACZ: I would -- maybe some of the attorneys
20 are willing to speak to their concerns.

21 THE COURT: Okay. Anyone want to address this?

22 MR. HACKNEY: Your Honor, good morning. Stephen
23 Hackney on behalf of Syncora. I guess what I would say
24 briefly is that I actually think this first question is
25 relatively simply solved by reference to the federal rules

1 because I think Ms. Kopacz is required to produce all the
2 facts and data that she considered --

3 THE COURT: Um-hmm.

4 MR. HACKNEY: -- so I don't think there's any choice
5 around that, and I think that given that rule, what I think
6 we want creditors to know is that if you give her something,
7 you should expect that it will be produced either because she
8 does so voluntarily or because it's often customary to
9 subpoena the expert anyway to the extent they have documents
10 not attached, so I actually view that as an --

11 THE COURT: Yeah.

12 MS. KOPACZ: -- unfortunate fact of the way the
13 federal rules work, but --

14 THE COURT: I'm inclined to agree with that. Does
15 anyone disagree with that?

16 MR. MARRIOTT: Good morning, your Honor. Vince
17 Marriott, Ballard Spahr, EEPK. No, I don't, which is sort of
18 what raises the issue insofar as materials prepared by our
19 experts would be subject to a privilege either as work
20 product or in the form of materials prepared by consulting
21 experts rather than testifying experts which would otherwise
22 not be discoverable becomes discoverable the minute we give
23 it to Ms. Kopacz, and that's the --

24 THE COURT: Right.

25 MR. MARRIOTT: That's the nub of the issue.

1 THE COURT: Right. So I think the answer here,
2 Ms. Kopacz, is that anything that anyone gives you is subject
3 to eventual disclosure, and you cannot assure anyone
4 otherwise.

5 MS. KOPACZ: Okay.

6 THE COURT: If someone is concerned about whether
7 information that you are asking for should be given to you on
8 this ground, I suppose your response to them should be to
9 consult with whoever hired them or whoever they feel
10 comfortable consulting with to determine whether the
11 information is privileged and should be subject to
12 nondisclosure to you.

13 MS. KOPACZ: Okay. So that will limit what I am
14 available to review and look at.

15 THE COURT: It will.

16 MS. KOPACZ: Yeah. Okay. And I will just --

17 THE COURT: And I ask you and I urge you to keep
18 track of information requests that you make that are denied
19 on --

20 MS. KOPACZ: Right. I have --

21 THE COURT: -- the grounds that whoever wants to
22 keep it confidential has elected to do so.

23 MS. KOPACZ: I have the situation now with the city
24 where members of my team who are working diligently with
25 Ernst & Young and Conway MacKenzie on understanding the

1 models, the projections, how they've changed over time and
2 the inputs to that. Any information that has not been
3 provided to the parties already is being withheld from us,
4 so, you know, again, there's nothing I can do other than
5 simply say that I've asked for -- you know, perfect example
6 is I've asked for the economics behind the settlement with
7 the unions to really understand how the -- how those costs
8 are going to be incorporated over time and what the cost of
9 that is going to be. That has not been provided to anyone.
10 It does exist, but I don't have it, so, again, I don't know
11 what else I do at this point other than, you know, use the
12 information that people are willing to give me. Is there any
13 way I can --

14 THE COURT: Well, hold on.

15 MS. KOPACZ: Okay.

16 THE COURT: Hold on that judgment for a moment. Is
17 there someone here from the city who'd like to defend that
18 position? And before you do so -- oh, I'll let you put your
19 name on the record.

20 MS. LENNOX: Thank you, Judge. Heather Lennox of
21 Jones Day on behalf of the city.

22 THE COURT: I'm disappointed to have to remind you
23 that the city has the burden of proving the feasibility of
24 the plan and that it strikes me, at least, that any and all
25 information that goes to the issue of feasibility is

1 discoverable not only by my own witness but by everybody.

2 MS. LENNOX: Yes, Judge. Let me clarify.

3 THE COURT: And one more thing. I said to Jones Day
4 before, and I'm disappointed that I have to repeat it, the
5 fact that something is subject to a privilege doesn't mean
6 you have to claim it.

7 MS. LENNOX: Understood, your Honor.

8 THE COURT: It could very well be in your client's
9 best interest on an issue as to which the city bears the
10 burden of proof not to claim privilege as to something which
11 could be claimed privilege.

12 MS. LENNOX: Or, your Honor, there is another way to
13 work around it, which we have proposed on this particular
14 item to Ms. Kopacz, where there are some information that was
15 subject to mediation privilege. We have decided to go and
16 prepare a comprehensive comparison that Ms. Kopacz has asked
17 for instead of giving her piecemeal and incomplete data. We
18 are preparing a comprehensive piece of data to give to her to
19 comply with the requests she has for these kinds of
20 comparisons, so we have been, I think, extraordinarily open
21 with Ms. Kopacz, and we do want her to have full access to
22 information so she can prepare a fair report. We are
23 absolutely in accord with that. And where we are running
24 into certain either incomplete information -- we are
25 endeavoring to work around it and prepare her another form of

1 the information that she needs, and we are, indeed, working
2 on this very item right now.

3 THE COURT: With the understanding that eventually
4 it will be disclosed to the Court and the other parties.

5 MS. LENNOX: Understood, your Honor.

6 THE COURT: All right. Ms. Kopacz, I'm not sure
7 that we can make any more progress on this at this time. I'm
8 willing to accept Ms. Lennox's representation --

9 MS. KOPACZ: Okay. That's fine.

10 THE COURT: -- that they want you to have all the
11 information that you need, and I would encourage you to be
12 patient with them as they develop that for you, not too
13 patient because the clock is ticking, and that if you do run
14 into a situation where you find that there is information
15 that you need that has not been produced or the production is
16 refused to write me another letter.

17 MS. KOPACZ: Okay. I will. I will do that.

18 THE COURT: All right. Any other questions apart
19 from the attorney question?

20 MS. KOPACZ: The other question had to do with
21 attorney participation in interviews.

22 THE COURT: Um-hmm.

23 MS. KOPACZ: I'm not opposed to that. I just didn't
24 know, you know, what the boundaries were for that or
25 whatever, so --

1 THE COURT: Um-hmm, um-hmm. Let's ask counsel their
2 views on this question.

3 MS. KOPACZ: Okay.

4 MR. HERTZBERG: Your Honor, Robert Hertzberg, Pepper
5 Hamilton. We want to participate in the form of just
6 watching, listening, and taking notes. We do not want to
7 actively participate in questions or interact with the expert
8 during this process. We think if our witnesses are present,
9 we should be able to have a representative of Jones Day or
10 Pepper there just to take notes. That's all we want to do.

11 THE COURT: So this is a request that applies to the
12 individuals on your witness list, not everybody else?

13 MR. HERTZBERG: Correct.

14 THE COURT: Okay. And, Ms. Kopacz, you say you
15 don't oppose that?

16 MS. KOPACZ: I don't oppose it at all because it
17 won't affect the questions I ask. It won't affect what I'm
18 seeking to find from these --

19 THE COURT: Okay.

20 MS. KOPACZ: -- individuals. I don't know if it
21 will affect the individuals obviously in how they interact
22 with me, but so be it. And then the only other thing that I
23 did want to clarify -- and I do have agreement with the city,
24 but I wanted you to be aware of it. In the ongoing day-to-
25 day work that's going on between my team and people at the

1 city, counsel for the city has said they don't need to
2 participate in those working sessions, so --

3 THE COURT: Right.

4 MS. KOPACZ: And I think, again, it's more just an
5 efficiency concern on my part as my team --

6 THE COURT: Right. Well, so what Mr. Hertzberg said
7 was they only want to be present when you talk to the people
8 on their witness list.

9 MS. KOPACZ: Talk to the witnesses on their list;
10 right.

11 THE COURT: And, Mr. Hertzberg, I hope counsel will
12 be available so that Ms. Kopacz's efficiency in doing those
13 discussions and interviews will not be impaired.

14 MR. HERTZBERG: Yes. We have someone scheduled to
15 participate in that process.

16 MS. KOPACZ: Yeah.

17 MR. HERTZBERG: It will not be an issue.

18 MS. KOPACZ: Yeah.

19 THE COURT: Okay.

20 MS. KOPACZ: So --

21 THE COURT: Anyone else want to be heard on this?

22 MR. HACKNEY: Your Honor, Stephen Hackney on behalf
23 of Syncora. Sort of an unprecedented situation here, but
24 what we were wondering was just to prevent there from being
25 sort of an asymmetry between who knows what about these

1 interviews, could there be creditor representatives, so
2 rather than having 20 people in the interview, can there be a
3 DWSD --

4 THE COURT: For what purpose?

5 MR. HACKNEY: For understanding what information is
6 being conveyed to Ms. Kopacz. You can ask about it after in
7 a deposition, but remember the city will be there taking it
8 live, and it's often difficult for people to remember in
9 depositions later what was discussed in interviews that
10 happened over a period of time, so --

11 THE COURT: Sir. I'll get back to you, Mr.
12 Hertzberg. Let me guess. You join in the request.

13 MR. NEAL: No.

14 THE COURT: No?

15 MR. NEAL: No.

16 THE COURT: Object to the request.

17 MR. NEAL I stand neutral. Your Honor, Guy Neal,
18 Sidley Austin, for National Public Finance Guarantee. I just
19 simply rose to echo what Mr. Hertzberg said and to give you a
20 concrete example. Ms. Kopacz will be meeting with our
21 consulting experts tomorrow, and I plan to join in that
22 meeting --

23 THE COURT: Um-hmm.

24 MR. NEAL: -- along the same lines that Mr.
25 Hertzberg said, just simply be there.

1 THE COURT: Okay.

2 MR. NEAL: This consultant is not a testifying
3 witness. That's the only clarification I rise to make clear.

4 THE COURT: Okay.

5 MR. NEAL: But I will simply be there as an observer
6 largely to protect the privilege.

7 THE COURT: Okay.

8 MR. NEAL: And is that okay with you, Ms. Kopacz?

9 MS. KOPACZ: Absolutely.

10 MR. HERTZBERG: Your Honor, we're not looking to sit
11 in when the other witnesses are interviewed. We have no
12 desire to. For example, if Syncora witnesses are being
13 interviewed, we have no desire to sit there. I think it
14 would be -- it should be the same with our witnesses. We
15 just want to observe what our witnesses are saying so when we
16 prepare them for trial we know what has gone on.

17 THE COURT: Yeah. It strikes me that the interests
18 of parties other than the party whose witnesses or employees
19 are being interviewed can be and are being adequately
20 protected by the normal discovery and trial process, so I'll
21 limit the participation or attendance of lawyers in
22 Ms. Kopacz's interviews to lawyers for the entity that has
23 either employed the witness who she's interviewing or are
24 employees of the party who the attorney represents.

25 MR. HERTZBERG: Your Honor, I'd like to just clarify

1 one thing based upon the statement you made. There are
2 witnesses that we've put on our witness list that we haven't,
3 quote, employed or are not employees of the city, but they're
4 listed witnesses.

5 THE COURT: Yeah. If they're on your witness list,
6 you can be there.

7 MR. HERTZBERG: Okay. Thank you.

8 THE COURT: And the same with other parties' witness
9 lists. Okay. Any other questions before we get to the
10 attorney question?

11 MS. KOPACZ: Yes. There are many people that I have
12 already interviewed both in terms of the city's side and in
13 terms of the creditors' side. Those are clearly all on my
14 contact log.

15 THE COURT: Um-hmm.

16 MS. KOPACZ: I don't really need to go back and redo
17 those to have somebody participate? Okay.

18 THE COURT: No.

19 MS. KOPACZ: Okay.

20 THE COURT: What's done is done.

21 MS. KOPACZ: Thank you.

22 THE COURT: The attorney question?

23 MS. KOPACZ: Yes, please.

24 THE COURT: Okay. So tell me why you think you need
25 an attorney because I need to be convinced.

1 MS. KOPACZ: You need to be convinced. I don't
2 believe this will be the last of these sorts of questions
3 and, again, either concerns that the city has, concerns the
4 creditors have --

5 THE COURT: This is your polite way of saying we
6 have a contentious case.

7 MS. KOPACZ: Yes. Okay. And while I do believe
8 that at this stage everybody does believe it's probably in
9 their best interest to help me as much as they can, right, I
10 am -- I have spent, to my way of thinking, too much time
11 addressing these issues when I'm really not qualified to
12 address them. We're here now today, and I think that's good,
13 and we're getting better clarity. I think it would be
14 helpful to me if I had someone who could speak to lawyers
15 with the same, you know, understanding, knowledge of what the
16 rules are, how this works. I think we could have ironed much
17 of this out without having to come before you if I had had
18 counsel, but I was just -- I was floundering.

19 The other thing that does concern me is when it
20 comes time for my deposition, I have -- I am not concerned
21 about my own testimony. I'm not concerned about my report.
22 I have no legal conclusions to reach as part of my job. With
23 that said, I do believe that as part of the deposition, part
24 of my testimony in court, you'll protect me when I'm here.
25 When I'm in the consolidated deposition, my sense is that,

1 you know, attorneys will try to make me their witness or try
2 to not make me their witness, and just knowing what the
3 boundaries are of what I should say and not say, I'm just --
4 I'm concerned.

5 THE COURT: Of course, at your deposition I'm only a
6 phone call away.

7 MS. KOPACZ: Yes, I would guess, but I can't talk to
8 you, remember?

9 THE COURT: Well, no. In that context --

10 MS. KOPACZ: I can?

11 THE COURT: -- I would permit that, absolutely. If
12 you have a question about whether you should answer a
13 question or not answer a question or if parties object and
14 you're not comfortable answering a question until an
15 objection is resolved --

16 MS. KOPACZ: Yeah. You know, I have -- I'm already
17 developing my own list of questions as to -- I've collected a
18 lot of data, and we're continuing to collect a lot of data.
19 And I have asked people to give me information that they
20 think might help me. Okay. Whether or not it becomes
21 information that I deem helpful, whether it becomes stuff
22 that I include in my report or not, I don't really know. And
23 to be honest with you, I don't know what I do from a
24 production perspective about all that sort of stuff once I
25 put my report together and whatever, so --

1 THE COURT: Um-hmm. Well, I've already imposed your
2 fees and expenses on the city, so let me ask the city if it
3 has a position on whether it would be willing to pay the
4 expenses of an attorney for Ms. Kopacz given the limited
5 purposes for which she seeks counsel.

6 MS. LENNOX: Your Honor, again, for the purpose of
7 facilitating this process, which we believe is a very helpful
8 one to the Court and to the parties, the city would be
9 willing to do that as long as they are limited -- very
10 limited, as your Honor would direct.

11 THE COURT: All right. All right. You have my
12 authorization and the city's to hire counsel with the
13 understanding that their participation will be as limited as
14 you have described and with the further understanding that I
15 am still here to answer your questions and help facilitate
16 your work.

17 MS. KOPACZ: Thank you, and I really appreciate
18 that. And thank you. I appreciate it. We're rolling.

19 THE COURT: Okay.

20 MS. KOPACZ: All right.

21 THE COURT: I'll prepare an appropriate order.

22 MS. KOPACZ: Thank you.

23 THE COURT: Okay. Let's turn our attention to the
24 motion to compel full clawback of debtor's document
25 production.

1 MR. SCHWINGER: Good morning, your Honor.

2 THE COURT: Sir.

3 MR. SCHWINGER: Robert Schwinger from Chadbourne &
4 Parke for Assured Guaranty. The city produced documents, I
5 guess, on Tuesday night by FedEx'ing out to various parties a
6 hard drive with its document production. People got them on
7 Wednesday and started to load them and look at them. By
8 Thursday morning, at least at the earliest that we're aware
9 of, the city was contacted by one of the parties to say that
10 they had discovered they were mediation-related documents
11 that were covered by the mediation privilege and order in the
12 production. The city --

13 THE COURT: And did you get this production as well?

14 MR. SCHWINGER: We did. Apparently all the parties
15 got the exact same production. We understand that the city
16 responded with an e-mail. One of the attorneys sent back an
17 e-mail saying, "Yes, we know there are problems with the --
18 with including some of these documents in the production.
19 We're going to do a clawback." We then -- I personally sent
20 the city a response, and I said, "Look, don't start clawing
21 back individual documents to put a spotlight on what's in
22 there," because, you know, you can't unring a bell when
23 people see it and then people say, well, if I see one
24 mediation-related document, they'll start looking for what
25 else might be in there. I said, "Look, you know, it's early

1 on. We just got the disks yesterday. Just claw back
2 everything, clean up the production, and send -- you know,
3 and send out the new disk and be done with it," and the city
4 did not do that. Instead they sent out a clawback letter
5 listing a number of the -- of more documents that were
6 subject to mediation privilege issues for clawback. This
7 letter, however, still did not capture everything that needed
8 to be captured. On Friday we notified the city again that
9 there were documents that were missing, and I got a response
10 back saying, "Oh, yes, we know. We're doing a thorough
11 review. We have lots more documents to add," and so on, but
12 even still, so far as I know, unless something has come in in
13 the last hour or so on my Blackberry that I haven't yet seen,
14 that further letter has not yet come out, and this is
15 obviously disturbing on a number of levels. One is that, you
16 know, just to introduce a little reality, you know, what the
17 parties got, your Honor, simply is this, this little, you
18 know, hard drive. That's all it is. We didn't get cartons
19 of documents. It would have been the simplest thing in the
20 world for the city to just say, "Look, everyone, send them
21 back. Delete what you loaded up on your computers -- and you
22 couldn't have processed much in the time you've had it -- and
23 we'll get out a clean version and be done with it." Instead,
24 the city put a spotlight on all the documents. The parties
25 have now had them for closing in on, what, six full days to

1 rummage through them and to find these documents if not even
2 on purpose but by accident, and these are mediation-related
3 documents that are not just related to my particular clients.
4 You know, we saw that they were documents relating to issues
5 of UTGO, COPs, swaps, pensions, retirees, OPEB. Obviously we
6 don't have to belabor for the Court that, you know, the
7 confidentiality is the linchpin around whether the mediation
8 process works. And the issue here, of course, is that for
9 certain parties such as the bond insurers like my clients
10 there are issues here that may go beyond this case. This may
11 not be the last municipal bankruptcy that is heard in
12 America, and these kind of issues are of grave concern to us.
13 I don't know what the status is of all the other mediations
14 that are out there and if they affect them, but there's
15 certainly a decent potential for a lot of things to be
16 disturbingly tainted by this. And the city, it seems to me,
17 has sort of -- I don't know if I would -- they did not take
18 the simplest and obvious way to nip this thing in the bud,
19 and instead they essentially have let it fester, and it's
20 still continuing to fester through this morning. What we
21 would ask is that the city claw back the entire production,
22 get those things straightened out, and then reproduce it. A
23 helpful suggestion was made that the city should, to the
24 extent that they are reproducing, keep all the Bates numbers
25 lined up so whatever work product people have done on the

1 existing documents they don't have to lose that way, and
2 that's fine. You could replace them with blank pages or
3 something. But we need to get this thing taken care of now
4 and immediately. This issue may also be affected by issues
5 which I think we'll get to later in the day about sort of
6 more general issues with the city's production, so in terms
7 of the impact this may have on the forward motion of the
8 case, it may have to be considered in light of what the Court
9 hears and decides with respect to those issues, so I just
10 wanted to mention that as part of the process.

11 The last thing I'll mention is this. I mean
12 obviously clawback is a well-known remedy when things get
13 produced that shouldn't be produced, but there's something
14 very important that's different here. If I'm doing my own
15 document production and I inadvertently let out an attorney-
16 client privileged document, it's my error, and if clawback is
17 a less than hundred percent perfect remedy, well, the person
18 that made the error has to bear the burden of that, but here
19 the city's error on this thing doesn't -- it may affect the
20 city, but it also affects many other parties who had no role
21 in the process of not being diligent enough to make sure this
22 material didn't get out, and so there's a mismatch, I think,
23 and that may have something to do with the city's degree of
24 attention and alacrity in dealing with this issue because the
25 people who bear the burden of what happens here are not the

1 ones who are really in a position to clean it up or to have
2 prevented it in the first place. So we would ask that the
3 city be directed to swoop everything back up, get this
4 cleaned up once and for all, get it certified, have all the
5 parties certify in writing that they have destroyed all
6 copies they have of what was sent out up to date, and we get
7 this issue taken off the table once and for all.

8 THE COURT: Thank you, sir.

9 MR. IRWIN: Good morning, your Honor. Geoff Irwin
10 from Jones Day for the city. The city deeply regrets that
11 these mistakes were made. I hate having to be here and have
12 this conversation with the Court. I would, however, like to
13 make the representation that these were not intentional.
14 They happened in connection with a very large document
15 production that took place over a very compressed period of
16 time.

17 THE COURT: How did it happen?

18 MR. IRWIN: It happened with reviewer error. There
19 are people --

20 THE COURT: What does that mean?

21 MR. IRWIN: We have document reviewers who have
22 eyeballs on every one of the documents that goes out the
23 door. We started with a collection -- and I'm sure we'll
24 have reason to talk about this later this morning as to why
25 it was so large. We collected almost 1.2 million documents

1 to review in response to this.

2 THE COURT: Were these people instructed to exclude
3 mediation confidential documents?

4 MR. IRWIN: Absolutely, and the system worked. We
5 were able to screen and protect against production --

6 THE COURT: It sort of worked.

7 MR. IRWIN: -- of multiples of more documents.

8 THE COURT: It sort of worked.

9 MR. IRWIN: I agree. I'm sorry. Your Honor, I
10 apologize. It worked when it was executed by the people
11 who --

12 THE COURT: It worked when it worked.

13 MR. IRWIN: -- we relied upon. It worked when it
14 worked. Fair enough. We had -- there were obviously
15 documents that made it through the system, and there were
16 people who missed --

17 THE COURT: How many?

18 MR. IRWIN: So we now believe -- and the reason --
19 one of the reasons we haven't, you know, put the order out,
20 we wanted to see how the Court wanted to deal with it this
21 morning. We wanted to be sure. We wanted to be right. So
22 we've been working this issue very hard since Thursday. We
23 think, based on the information that's available to me, it's
24 about 120 documents. Now, I recognize that's a --

25 THE COURT: Do you have any objection to the relief

1 that's sought here today?

2 MR. IRWIN: I don't want to slow down the schedule.
3 The city's concern is that the time it will take to reproduce
4 the documents, which we can do, and --

5 THE COURT: You haven't done it already?

6 MR. IRWIN: We have not reproduced the entire file.
7 We needed to know what the documents were. We needed to know
8 what documents --

9 THE COURT: But you already told me you know those.
10 It's 120.

11 MR. IRWIN: Yes, as of late last night. I now know
12 what the universe of documents is.

13 THE COURT: How long does it take to produce a new
14 hard drive?

15 MR. IRWIN: Probably takes two or three days to do
16 this I'm told.

17 THE COURT: How many hard drives do you need to send
18 out?

19 MR. IRWIN: There are two dozen or so parties who
20 have propounded discovery on the city.

21 THE COURT: It takes two days to produce two dozen
22 hard drives?

23 MR. IRWIN: To go into the system, yes. I'm told
24 the electronic vendor that we use, to go into the system and
25 manually remove the documents that we have now identified as

1 of last night will probably take a day or two, and then we
2 need to produce the hard drives, so it will just take --
3 it'll take a couple days.

4 THE COURT: And your concern about that is what?

5 MR. IRWIN: My concern about -- I don't have a
6 concern about that, and the city is willing to do that. My
7 concern is --

8 THE COURT: Well, let me just ask again what -- do
9 you object to the relief that's sought here today?

10 MR. IRWIN: I don't object to reproducing the
11 documents. What I object to is the notion that everyone who
12 has the hard drives that were produced last week has to stand
13 down and destroy those and destroy any searches that they've
14 run against those materials because I predict people will
15 then say because we didn't get the new hard drives and
16 because we had to start over on Wednesday or Thursday or
17 Friday of this week, they will say the schedule now needs to
18 change in the following ways that I can't predict, and my
19 suggestion is simply that we are willing to reproduce the
20 hard drives, but it shouldn't impact parties' ability to
21 use -- to run their searches and use the disks that they have
22 right now and abide by the new clawback letter that I am
23 perfectly prepared to put out later today now that I know the
24 universe of documents, but we will do as the Court instructs.

25 THE COURT: If parties have to reproduce work

1 because of a violation of this Court's mediation order,
2 mediation confidentiality order, shouldn't the city be
3 responsible for that?

4 MR. IRWIN: Responsible in which way, your Honor?

5 THE COURT: Economically.

6 MR. IRWIN: You mean to pay for the hard drives that
7 go out?

8 THE COURT: No. If parties have to reproduce work,
9 redo work as a direct result of the city's violation of the
10 mediation confidentiality order, shouldn't the city be
11 responsible for the cost of that?

12 MR. IRWIN: I think that's what I'm trying to say is
13 that my proposal is and the city's position is they should
14 not have to redo work. They should be able to rely on the
15 data and the documents that were released in connection with
16 the first --

17 THE COURT: Well, but that does nothing to reverse
18 the violation of the confidentiality that occurred. You're
19 leaving the confidential documents in the hands of people who
20 shouldn't have them.

21 MR. IRWIN: Fair, your Honor. I understand that. I
22 would also -- there are, again, over a hundred documents that
23 we're talking about. I have had a chance to look through a
24 number of them. I have not looked through all of them. And
25 I'm not going to talk about the substance of any documents or

1 things like that, but I can also say that in many of these
2 cases what has happened is -- or the contents are city
3 communications, city internal that liken them much more to
4 what we've heard about an inadvertent production of your own
5 attorney-client documents. There will be an e-mail that'll
6 be a request for information, a standard set of information
7 requests that then gets kicked around among counsel five or
8 six times saying in a different e-mail how should we respond.
9 That could be five or six of the 120 documents as to which
10 there is absolutely no prejudice to anyone except perhaps the
11 city in terms of deciding what we should do about these
12 things. To be clear, there are plainly documents in here as
13 to which I am quite sure the participants to this mediation
14 believed and hoped and expected under the terms of the order
15 that would remain confidential, but I don't believe that the
16 magnitude of the problem is that we have 120 exchanges of
17 information where there are terms that would put a third
18 party in a position where it feels like this is information I
19 fully expected would stay confidential.

20 THE COURT: Anything further?

21 MR. IRWIN: Your Honor, we would only point to the
22 fact that under Federal Rule 37 an inadvertent mistake is not
23 sanctionable, and that's what we have here. This is not a
24 deliberate or intentional violation of the Court's order.

25 THE COURT: Well, perhaps so, but if parties have to

1 do extra work because of your violation of a court order, why
2 should they bear the burden of that?

3 MR. IRWIN: And, again, your Honor, that's why I'm
4 suggesting they shouldn't have to do that.

5 THE COURT: All right. Does anyone else want to be
6 heard regarding this matter?

7 MR. PEREZ: One second, your Honor. Your Honor,
8 Alfredo Perez on behalf of FGIC. I think part of the problem
9 arises from the fact that they produced the same documents to
10 everybody whether they were responsive to your document
11 request or not. And, for instance --

12 THE COURT: Is this where you ask them not to do
13 that in round two?

14 MR. PEREZ: Well, you know --

15 THE COURT: Sir --

16 MR. PEREZ: I'm sure that they did it -- I'm sure
17 that they did that in order to be quick, but I don't know
18 whether that's -- whether they can do that or not do that
19 because they certainly haven't identified what documents
20 relate to what request, but the --

21 THE COURT: All right. I'm going to ask you to hold
22 on that one until we address it more directly later.

23 MR. PEREZ: Yeah. What I was going to say --

24 THE COURT: We have a very specific problem we're
25 trying to solve here, and your raising that issue doesn't

1 help us.

2 MR. PEREZ: Your Honor, what I was going to say --
3 and I got a little sidetracked, but what I was going to say,
4 we made proposals to them in the context of mediation. Those
5 were produced to everybody. That's the kind of thing that
6 I'm concerned about.

7 THE COURT: Right. Sir.

8 MR. IRWIN: May I --

9 THE COURT: One second.

10 MR. IRWIN: Okay.

11 MR. ANGELOV: Good morning, your Honor. Mark
12 Angelov for Ambac Assurance Corporation. There's a practical
13 way to limit the impact of this production and the defect in
14 the production on the work product that the parties have
15 done, and that's something that's been alluded to before.
16 People will not necessarily have to redo the searches and
17 whatever marking and foldering they have done with the
18 documents that have been produced if the city is careful in
19 repeating the production in such a way that all the control
20 numbers and the Bates numbers line up, and so in that event
21 people wouldn't have to go back to square one. Thank you.

22 MR. IRWIN: Two brief points. That's actually what
23 I was referring to when I said if people could preserve their
24 work product. If the city were to reproduce, we would
25 produce it in such a way that would allow them to --

1 THE COURT: All right. If there's a technological
2 solution to this, great, but in the meantime I'm going to
3 order you, sir, and the others who have spoken up here today
4 and really anyone who has an interest in this to meet and
5 confer during our breaks today, perhaps over lunch, to see if
6 you can come to an agreement on how to solve this problem.
7 In the Court's view, this is a major problem that needs to be
8 solved today.

9 MR. IRWIN: Understood, your Honor. Thank you.

10 THE COURT: Let's turn our attention to the motion
11 to compel Wayne, Macomb, and Oakland Counties to produce a
12 privilege log.

13 MR. MONTGOMERY: Good morning, your Honor. Claude
14 Montgomery, Dentons, for the Retiree Committee. We are the
15 movants today. Your Honor, we filed our motion. I believe
16 Macomb filed an opposition, Oakland filed an opposition, and
17 Wayne did not, but it had a pending objection to discovery,
18 which includes the rejection of producing privileged
19 information. I think we have a practical problem in that
20 everybody understands the rule. Everybody understands that
21 there's an obligation to produce a privilege log except when
22 it would be extraordinarily burdensome, and then they can go
23 the category route if you follow the advisory committee's
24 role and the party that is resisting has sought a protective
25 order. Here we've sort of conflated the matters, and we're